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No. 567

In the Supreme Court of the United States

October Term, 1948

THE WHOLESALE TIRE SUPPLY INSTITUTE, INC., ET AL., PETITIONERS,

v.

FEDERAL TRADE COMMISSION,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

INDEX

CITATIONS

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THE WHOLESALE DRY GOODS INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1887) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered December 2, 1943 (R. 1891). Petition for writ of certiorari was filed December 30, 1943. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719, 15 U. S. C. sec. 45, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Federal Trade Commission, in a proceeding charging unfair methods of competition, is required to admit evidence offered to show the trade conditions which led the parties to enter into a combination to set up a list of wholesalers and to rate manufacturers on the basis of the extent to which they favor the wholesalers so listed, enforced by threat of withdrawal of patronage from manufacturers not conforming to the policy of favoring those on the selected list.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The petitioner, The Wholesale Dry Goods Institute, Inc. (referred to herein as the Institute), is an unincorporated association composed of

concerns engaged in selling at wholesale dry goods, notions, and like merchandise, and the other petitioners are members of this association. In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission, after a lengthy hearing, made the following findings of fact, which are not claimed in the petition to be unsupported by the evidence:

From 80 to 85% of the total volume of wholesale trade carried on by general dry goods wholesalers is done by Institute members (R. 287). In 1930 the Institute embarked upon a program of compiling information as to the sales policies of dry goods manufacturers, assigning ratings to these manufacturers based upon their sales policies, informing each manufacturer of his rating and distributing the ratings to its members (R. 294, 297–299). Information on which the ratings were based was obtained to some extent from members, but primarily by sending a questionnaire to manufacturers (R. 294–296). The ratings assigned were designated by symbols: A, A—, B, C, D, K, X, and No (R. 297–298). "A" meant that the manufacturer sold exclusively to those whom the Institute recognized as "wholesalers"; "A—" that it sold regularly only to such wholesalers, but manufactured special contract goods, under buyer's specifications and labels, for national chains and mail order houses; "C" that it sold to others than those recognized by the

Institute as wholesalers but allowed a "reasonable differential" to wholesalers (R. 297–298).[1]

The Institute supplemented its program by adopting a detailed definition of "wholesaler" and publishing a directory listing the concerns (whether Institute members or not) which it deemed came within this definition (R. 299–300). This directory the Institute distributed to its members and to the manufacturers rated by it (R. 299). Many competitors of Institute members engaged in whole or in part in selling dry goods at wholesale and listed as wholesalers by commercial agencies were denied membership in the Institute or listing in its directory upon the ground that their operations did not conform to the Institute definition (R. 302, 304).

The Institute urged its members to report to it any instance of a sale by a manufacturer not consistent with his Institute rating, and thereupon addressed a letter of inquiry to the manufacturer (R. 306, 312–313). If assurance was given that the manufacturer would discontinue the sales complained of, he was notified that no change would be made in his rating, but if no satisfactory adjustment was reached, the Institute gave the manufacturer a lower rating and advised its members of the change (R. 313). The Institute urged

[1] As a further indication of the character of the ratings, "X" meant that a manufacturer, after announcing one policy, had been found to practice another, and "No" meant that information concerning selling policy had been refused (R. 298).

its members to buy only from those classified as having sales policies satisfactory to the Institute and to do everything possible to make manufacturers "rating conscious," and most of the members confined their purchases, so far as practicable, to such manufacturers (R. 305–306, 309).

The Institute's program had a coercive effect upon manufacturers both in selecting their individual customers and in determining their general sales policies (R. 313–314).[2] The tendency and effect of petitioners' combination has been and is to coerce and restrain dry goods manufacturers in their selection of customers; to prevent dealers in dry goods from purchasing their supplies directly from manufacturers; to prevent such dealers from buying at prices as favorable as those granted to Institute members; and to empower petitioners to harass and restrain the operations of those who do not conform to the policies of the Institute (R. 326).

The Commission concluded that petitioners' combination and their practices thereunder were unfair methods of competition forbidden by the Federal Trade Commission Act (R. 326–327).

The Commission issued an order requiring petitioners to cease and desist from combining and conspiring to establish themselves as a preferred class of buyers, or to restrain manufacturers in the determination of their sales and pricing

[2] For various specific instances of such coercive effect, see R. 314–325.

policies or selection of customers, by maintaining and circulating any list of recognized wholesalers or any list of manufacturers so rated as to indicate the degree to which their sales policies are satisfactory to petitioners, or by threatening manufacturers with loss of patronage if they deal with buyers not recognized by petitioners as wholesalers (R. 329–330).

On petition for review of this order, the court below rendered a *per curiam* opinion holding that the Commission's finding of a boycott of manufacturers whose sales policies were disapproved by petitioners was supported by substantial evidence and that such conduct was unlawful (R. 1887–1889). The court said that "it is impossible to see how any fair tribunal could have come to another conclusion" (R. 1889).

ARGUMENT

Petitioners contend (Br. pp. 9–10, 13) that the Commission erred in rejecting evidence offered to show the existence of "abuses" in the industry which their program to rate manufacturers and to list wholesalers might serve to remedy.[3] We

[3] Notwithstanding petitioners' broad characterization of the evidence rejected as relating to "fraudulent, immoral, unethical, discriminatory or illegal" practices (Pet., p. 7), the gist of their only offers of proof as to conditions generally prevailing in the industry was that sales to retailers at the same price as to wholesalers resulted in "inequities" in the distributing trade (R. 1729–1732, 1833–1834). The other rejected proof related to whether particular concerns were doing a wholesale business (R. 188–205).

submit that the irrelevance of such evidence is established by *Eastern States Retail Lumber Dealers' Ass'n* v. *United States,* 234 U. S. 600, and *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457.

In the former case, certain associations of retailers circulated among their members the names of wholesalers who sold direct to consumers with the intent and purpose that members decline to deal with the listed concerns. There was no agreement not to deal with these concerns and no penalty attached for failure so to do (234 U. S. 600, 608). Just as the present petitioners, so the defendants in the *Retail Lumber Dealers* case asserted that their united action constituted a reasonable measure of self-defense against competition and trade which by-passed one step in the distributive process and threatened to destroy a class of distributors alleged to be performing a necessary economic function.[4] But this Court, in holding that a combination to exercise group pressure through the threat of withdrawal of patronage violated the Sherman Act, said (p. 613)

[4] See the statement of the district court, *United States* v. *Eastern States Retail Lumber Dealers' Ass'n,* 201 Fed. 581, 584 (S. D. N. Y.):

"* * * It is pointed out that it is expensive for a retailer to maintain a yard, with large quantities of a great variety of lumber in it, ready for prompt delivery at all times. If his business shrinks, through his losing the chance of making car and schooner load sales in his locality, the local yard, it is said, will become less and less well stocked, and will finally disappear entirely."

that it could not be justified upon the ground that "the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities."

The *Fashion Originators' Guild* case reaffirmed and amplified this holding. In that case the Guild members, manufacturers of garments embodying designs originated by them, agreed not to deal with stores which sold garments copied from the designs of Guild members. This Court upheld the action of the Federal Trade Commission, in a proceeding charging use of unfair methods of competition, in rejecting evidence offered to show that the practices of the Guild were (312 U. S., at 467) "reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four." This Court said (p. 468) that since the combination was such as to fall within the prohibitions of the Sherman Act, evidence offered as to the reasonableness of its practices "is no more material than would be the reasonableness of the prices fixed by unlawful combination."

The characteristics of the combination which this Court referred to in that case (p. 465) as bringing it within the ban of the Sherman Act are also present here. Petitioners' combination narrows the outlets to which dry goods manufacturers can sell and the sources from which dealers in such goods (other than those classified by

petitioners as wholesalers) can buy. The combination subjects all manufacturers who fail to adopt the sales policies advocated by petitioners to an organized boycott. The necessary tendency, as well as the purpose and effect, of the combination is the suppression of competition in the sale of goods direct from manufacturer to retailer. Petitioners determine for themselves who shall be listed as wholesalers and what rating shall be assigned to each manufacturer, and the combination therefore "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce" (p. 465).

Petitioners contend (br. pp. 19–20) that the court below misinterpreted *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. But in that case this Court found that the defendants had not combined to fix or control market price. The view expressed that all concert of action by competitors taken for the purpose of remedying trade abuses is not outlawed by the Sherman Act has application only to a combination which does not regulate prices or production or otherwise suppress competition by illicit means. The boundaries of the decision are clearly marked in later cases.[5]

We likewise submit that petitioners fail to show any conflict between the decision below and *Maple*

[5] *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553, 598–599; *Socony-Vacuum Oil Co.* v. *United States,* 310 U. S. 150, 214–216; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 468.

Flooring Manufacturers Assn. v. *United States,* 268 U. S. 563. That case upheld the activities of a trade association in gathering from its members statistical data on current operations and distributing this information among the members. The basis of decision (pp. 585–586) was that the defendants had not reached or attempted to reach any agreement with respect to limiting production, raising price or otherwise restraining competition. In the instant case the information furnished, as the court below pointed out (R. 1889), has no value to petitioners except as it is made the basis for withholding trade from those whose sales policies are objectionable to petitioners.

Whether petitioners might, without offending the antitrust laws, compile and distribute factual statements showing or tending to show that particular concerns were falsely masquerading as wholesalers is not in issue in this case. Their actual course of conduct was very different. They assumed to judge who should be listed as wholesalers, to assign a specific rating to each manufacturer, and then to enforce these determinations by a thinly veiled threat of withdrawal of patronage. Concerning practices of this character the court said in *Federal Trade Commission* v. *Wallace,* 75 F. (2d) 733, 737 (C. C. A. 8):

> It is not a prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to

enforce by drastic and restrictive measures their conceptions thus formed.

Petitioners urge (br. p. 10) that it was error for the Commission to reject evidence offered to show the percentage of petitioners' sales to the total volume of sales of dry goods to retailers (including sales direct from manufacturer). We submit that this evidence was properly rejected as irrelevant and that in any case, if there was error, it was not prejudicial since the Commission made no finding that petitioners are monopolizing or attempting to monopolize trade in dry goods. Furthermore, a purely evidentiary ruling presents no general question of law warranting review by certiorari.

CONCLUSION

The decision below is clearly correct and is not in conflict with any decision of this Court or of another Circuit Court of Appeals. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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